

Parent v. Harpswell Coastal Academy
Complaint 20.007C
Complaint Investigator: Jeannette Sedgwick
September 20, 2019

COMPLAINT INVESTIGATION REPORT

The Department of Education received this complaint on July 25, 2019. The complaint investigator reviewed all documents, information, and responses from the parties. On August 23, 2019, the parents were interviewed and on August 27, 2019, the following school staff were interviewed: the charter school's special education director, the Student's special education teacher, the Head of the charter school, the Student's speech/language pathologist, and the charter school's social worker. The investigation covers the time period from July 25, 2018 - the present.

FACTUAL FINDINGS

1. The Student is eighteen years old. The Student's parents have legal guardianship of the Student, who qualifies for special education and related services based on a variety of diagnoses that have an adverse effect on his education, including Tourette Syndrome, specific learning disability, and autism spectrum disorder, unspecified anxiety disorder, mood dysregulation disorder, and expressive language disorder.
2. Evaluations of the Student from 2016 show that the Student's cognitive abilities as measured by the WISC-V are below average range. Subtests of the WISC-V from 2016 show that he was in the 4th, the 22nd, and the 8th percentiles in verbal knowledge, visual spatial processing, and fluid reasoning, respectively. The KTEA-II administered in 2016 shows that the Student is in the 9th percentile for reading, the 14th percentile for mathematics, and the 25th percentile in the written language index.
3. The Student attended the charter school during the 2018-2019 school year after receiving education in a day treatment program that focused on behavioral interventions. The Student attended the charter school for one day each week beginning in October 2018 until he began attending the charter school full time in February 2019.
4. An FBA conducted in 2017 stated that the Student, though displaying resistance to the day treatment program, had made significant progress such as reductions in noncompliance and the severity of aggression and that he had become much more responsive to behavioral guidelines. That FBA contained several techniques that had been used with the Student with some success.
5. When the Student entered the charter school, the Student's IEP stated that he has academic and functional needs and that the Student needed positive behavioral strategies

to address behavior that impedes his and others' learning. The present levels of performance section on this IEP stated that the Student's current social communication, language processing, and executive function skills are inadequate to navigate academic expectations and make or maintain friends and often create unnecessary conflict. The Student "most likely experiences difficulty processing language at the same level of his peers and [has] difficulty with executive function tasks." The IEP for the day treatment setting contained the following:

- Specially designed instruction for 29.5 hours each week
 - Social work services 30 minutes each week
 - Speech and language consultation 60 minutes each month
 - ESY.
6. On January 4, 2019, the Student's IEP Team met for an annual review. Written Notice from this meeting states that the Student would receive a 1:1 aide, 30 minutes/week of direct instruction in reading and writing, 30 minutes/week of social work, 30 minutes/week of speech and language services and 30 minutes of speech/language consultation at the school. The IEP Team decided, without first conducting evaluations, to discontinue specially designed instruction in math.
 7. The Student was assigned a 1:1 aide in the classroom for some of the school year. Staff reported the Student was verbally aggressive to the aide and that the Student's negative behaviors would sometimes increase with the interventions of the aide.
 8. The school's special education teacher stated that initially, she delivered specially designed instruction (SDI) to the Student in a separate classroom. In the second half of the year, she provided SDI within the general education setting. School staff indicated that special education instruction techniques, those that are different than those presented in the classroom, were not utilized with the Student, with the exception of breaking down material into smaller portions.
 9. School staff stated that the Student was receiving a good deal of academic support through a supported study period and through SDI.
 10. While the Student was at the charter school, he engaged in disruptive, negative behavior. This behavior included verbal and physical aggression, racist comments, and sexist comments towards his peers and the staff. The Student routinely did not engage in related services when he was asked to leave the general education classroom to receive those services. Negative interactions with peers occurred on the bus and in school.
 11. School staff stated that the behavioral plan that had been in place in the day treatment setting was implemented when the Student enrolled at the charter school. The parent stated the behavioral plan could not have been implemented because the school disciplined the Student for "taking a break" outside of the building, which was one of the Student's coping strategies in accordance with the behavior plan.
 12. The parent requested an FBA from the charter school on February 4, 2019. The school did not immediately send the parent a consent form. Once the school found a practitioner

to conduct the evaluation, the school sent consent form to the parents on March 26, 2019, which was signed the next day. The FBA was completed in May 2019. The Student's parents stated that they do not believe the FBA has been completed because, among other reasons, they would like to have more observations completed.

13. Late in the school year, the school created a positive behavioral intervention plan which came into effect on June 14, 2019. After discussion with the Student's parents, the behavioral plan was modified. The school stated that reports of the Student's progress have been on their on-line portal since enrollment. The school provided progress reports to the parent on March 8, 2019 and June 7, 2019, in conjunction with the school's academic schedule.
14. The school submitted notes regarding progress in his classes, which were posted on the portal at some time during the spring of 2019. The parents stated that this information had not been in the portal until after this complaint was filed.
15. An IEP Team meeting was held on June 14, 2019 to discuss the FBA. The Student's parents, who believed the FBA to be incomplete, sent a list of concerns about the FBA to the school and the Team agreed to meet again prior to the start of the 2019-2010 school year.
16. The IEP resulting from the June meeting contained the following information about the Student's present level of performance: the Student struggles to understand what his peers are saying through their body, language, tone, and level of sarcasm. This IEP contained goals for reading and writing and functional/developmental skills. The Student was placed for 97% of the time with non-disabled children. Services on the IEP that are relevant to this complaint are the following:
 - SDI in reading and writing instruction 30 minutes/week in the special education setting
 - ESY (two weeks of 3 hours/day for 4 days each week)
 - Speech and language services for 15 minutes once a week
 - Social work services for 30 minutes each week
 - Consultation for speech and language services to the Student's teacher and social worker.
17. The school administration and parent discussed an accountability plan for the Student. School staff stated that accountability plans are used with students at the school in order for students to be more supported in becoming responsible for their actions and learning. The Student's plan involved the Student taking accountability for using harassing and sexually charged language with peers and staff. Citing concerns about this accountability plan, the parents did not send the Student to ESY programming in 2019.
18. The Student's parents have expressed concern that the Student's inappropriate verbal interactions are part of his disability and that his needs for instruction in social skills were not being met at the school. The parents also expressed concerns to school staff that those working with the Student did not understand the Student's disabilities.

Other relevant facts are included in the determinations below.

DETERMINATIONS

The complainant alleged the following:

1. The complainant requested an FBA for the Student on February 5, 2019 and the school did not complete it within the regulatory timeframe. MUSER IV(2)(E); MUSER V(1)(A)(3); MUSER V(4)(B). **NON-COMPLIANCE FOUND.**

The school did not send a consent to evaluate form to the parent after the parent requested an FBA. The FBA was completed on May 30, 2019, outside of the 45-day regulatory requirement. The school stated that this delay was caused in part by the lack of providers available to provide the FBA, as well as finding a date that was convenient for all parties and the graduation schedule. The school did not comply with regulations concerning the completion of the evaluation.

2. Decisions about educational services and placement are occurring outside of the IEP Team process. MUSER VI(2)(I). Specifically, the complainant states that the Principal is adding restrictions to the Student's educational experience. **NON-COMPLIANCE FOUND.**

The Maine Unified Special Education Regulations state, in relevant part,

The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions regarding:

- (1) The child's needs and appropriate goals;
- (2) The extent to which the child will be involved in the general curriculum and participate in the regular education environment and State and district-wide assessments; and
- (3) The services needed to support that involvement and participation and to achieve agreed-upon goals. Parents are considered equal partners with school personnel in making these decisions, and the IEP Team must consider the parents' concerns and the information that they provide regarding their child in determining eligibility; developing, reviewing, and revising IEPs; and determining placement.

The IEP should be created in such a way that the Student is able to make progress in accordance with his own unique circumstances.¹ The IEP Team should make decisions

¹ *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 999 (2017).

according to their own expertise, the child's progress and potential for growth, and the views of the child's parent. An IEP must be reasonably calculated to ensure progress.² In order to create an IEP reasonably calculated to enable a child to make progress, the IEP Team should consider the child's academic growth, whether the child is progressing towards grade-level proficiency, the child's behaviors that may interfere with his progress, and additional information and input provided by the child's parents.³

The school has a policy of creating individualized accountability plans for students when it determines that a student's behavior or actions are leading to undesired outcomes. School staff stated that this policy is a policy for all students, not just those who receive special education and related services. The proposed accountability plan for the Student included disciplinary consequences for actions such as inappropriate verbal behavior.⁴ The plan specified that there would be an increasing level of discipline, including suspensions, after patterns of harassment. The plan also included the possibility of a formal harassment investigation that would include the Head of School determining "additional accountability steps based on the severity of the behavior and a persistence of a pattern." The parents believe that an accountability plan is a predetermination about educational placement. Because the plan addresses his behavioral needs outside of the IEP process, the parents are concerned that the Student's disabilities that cause the Student's inability to interact with peers in appropriate ways have not been considered.

Districts may discipline students who receive special education and related services. The IDEA and MUSER provide specific procedures for disciplinary actions that create a change in placement, such as long-term suspensions and expulsions.⁵ While the school has the right to establish an accountability plan involving discipline, the appropriateness of such a plan should be considered within the context of the Student's IEP.

The Student's need for constant negative reinforcement is a function of his disability that is well documented in the IEP and previous FBAs. This particular accountability plan specifying these particular disciplinary consequences for the Student's behaviors, some of which are documented as functions of the Student's disabilities, is not in concert with the Student's educational and functional needs. The Department notes that the Student's actions in the school have created an unhealthy environment for both the Student and his peers. The Student's racist and sexist comments have had an extremely negative affect on the Student's own learning, peers'

² *Id.*

³ MUSER V(2)(B); MUSER VI(2)(J).

⁴ School personnel stated that the Student's behaviors were often purposefully harmful and that the Student knew that he would not be held accountable for his actions. The parents, on the other hand, believe some of the Student's inappropriate behaviors to be outside of the Student's control.

⁵ MUSER XVII(1).

responses to the Student, and the school climate.⁶ Rather than solely providing progressive discipline for the Student, the Student's IEP Team should have convened when the Student's progress in behavioral goals was stalled. The school should have reconvened the IEP Team sooner than June to determine why the Student was not making progress in his functional goals.

The school has not complied with law or regulation regarding this allegation.

3. The IEP Team has not considered the use of positive behavioral interventions and supports, and other strategies, to address the Student's behavior and has not considered the communication needs of the child. MUSER IX (3)(C)(2)(a); MUSER IX (3)(C)(2)(b). Specifically, the complainant alleges that the school has not created a behavioral plan for the Student that addresses his needs and is punishing him for disability-related behaviors.

COMPLIANCE FOUND.

The school has considered the use of positive behavioral interventions and strategies to address the Student's behavior and communication needs both through the Student's IEP and through other individualized and school-wide practices. During interviews, staff members explained the multiple approaches used during school when the Student was exhibiting behaviors that interfered with his own learning and the learning of others. Some of the strategies used were waiting, not giving positive or negative reinforcement for inappropriate verbal interactions, and de-escalating situations. The social worker and the speech/language pathologist implemented the functional and social goals on the Student's IEP. The school administration worked with the parents and the staff to balance the Student's needs with the needs of a harassment-free school climate.

Regarding the disciplinary incident for the Student taking a "time-out," the parent's statement that the behavioral support plan in place at the day treatment program was not initially implemented at the school is likely accurate. Considering the entirety of the time the Student was enrolled in the school, however, the school has complied with law and regulation regarding this allegation.

4. The Student is not making progress in his goals or in the general education curriculum and the IEP Team has not met to revise the IEP to address the lack of expected progress. MUSER VI(2)(J); MUSER IX(3)(D)(1)(b)(i).

NON-COMPLIANCE FOUND; DENIAL OF FAPE FOUND.

⁶ The parents also argue that the disciplinary actions taken by the school have been unfairly applied. The complaint process established by the IDEA and MUSER do not include review of individual disciplinary actions.

Among the major responsibilities of an IEP Team is the responsibility to review the IEP at least annually in order to determine whether the annual goals for the child are being achieved, and revise the IEP as appropriate to address any lack of expected progress toward the annual goals and in the general curriculum.⁷

The parents stated that the Student's progress was not uploaded onto the on-line system during the spring of 2019 and so they were not able to ascertain whether progress was being made. The school states that staff had multiple conversations with the parents and that progress reports were sent home on March 8, 2019 and June 7, 2019, in conjunction with the school's academic schedule. These reports show the Student as making adequate progress and inadequate progress in various goals areas. The Student's progress in June 2019 was inadequate for speech/language and social work goals.

The Student's IEP when he entered the charter school contained multiple behavioral goals. For instance, the day treatment program had included goals in the areas of self-management strategies for decreasing noncompliance and disrespectful language; a goal to increase engagement in socially appropriate interactions; a goal for increasing healthy peer relationships through awareness of emotional/behavioral patterns and management of emotions. The Student's IEP created in June 2019 included functional goals for identifying communicative intent; social work services in self-management and pro-social behavior, increasing ability to process and accept feedback related to social experiences, and social work services reducing interfering behaviors and managing impulsivity. The total time each week for these goals was 45 minutes.

The Student began experiencing trouble with social situations almost immediately upon enrolling in the school. The school's response states that the Student's challenging behaviors continued throughout the spring of 2019. These behaviors included aggression, disrespectful language, including racial slurs and swearing, noncompliance, socially inappropriate verbalizations and actions, bullying, and sexting another student. There were multiple highly inappropriate interactions between the Student and his peers throughout the spring. The psychologist conducting the FBA observed that when peers and staff ignored certain disruptive behaviors, those behaviors ceased. He did not progress in his functional goals in the late spring of 2019, and staff interviewed indicated that the Student's negative responses to them increased after staff addressed them to the detriment of his learning and that of others.

There was a clear lack of expected progress in functional goals and the IEP Team should have convened much sooner than June 2019 to re-evaluate the level of support for the Student, even while the school was finding an evaluator to conduct the FBA in February and March 2019. Because the student was not making progress in his functional goals and the IEP was not revised by the IEP Team, the school did not comply with the regulations regarding this allegation.

⁷ MUSER VI(2)(J); MUSER IX(3)(D)(1)(b)(i).

5. The school did not provide progress reports at least as often as those provided to the students in general education. MUSER IX(3)(A)(1)(C). **COMPLIANCE FOUND.**

The school sent home progress reports to the parents on March 8 and June 7, 2019, the appropriate number of reports that the Student should have received progress report based on the frequency of reports given to peers. The parents had requested more detailed information about academic progress in the spring and stated that the portal to the on-line system was not working to check academic progress. The special education laws regarding progress require reports be provided at least as often as those provided to students in general education, which occurred here. The school complied with regulations regarding this allegation.

6. The Student did not receive specially designed instruction in reading, writing, and math as specified on his IEP. MUSER IX(3)(B)(3). **NON-COMPLIANCE FOUND; DENIAL OF FAPE FOUND.**

Special education means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. Special education includes each of the following if the services otherwise meet the requirements of the first paragraph: speech-language pathology services, travel training, and vocational education. Special education does not include general education procedures that are a part of formal general education intervention as elsewhere referenced in these rules.⁸

School staff stated that the Student was receiving his specially designed instruction for academics in a special education setting when he first arrived at the school, and then received his specially designed instruction for academics within the general education classroom. School staff did not explain how academic instruction was given or how the instruction was individualized to meet the Student's needs. Rather, school staff indicated that the extra academic support the Student was given equaled specially designed instruction. The school could not clearly articulate how academic instruction was delivered through special education services. Additionally, the IEP Team discontinued SDI in mathematics in January without having conducted assessments to determine why mathematics instruction was no longer needed even when assessments from May 2019 indicated that he was in the low average range in that subject.

The school has not complied with special education law and regulation regarding this allegation.

⁸ MUSER II(37).

7. The Student's IEP does not address all of the Student's disability-related needs, such as his needs related to social interactions, Tourette Syndrome, and mental health issues related to his anxiety. MUSER IX(3)(A)(1); MUSER XI.

NON-COMPLIANCE FOUND; DENIAL OF FAPE FOUND.

In *Andrew F.*, the Supreme Court clarified that the standard for determining whether an IEP is sufficient to provide FAPE is whether the child is offered an IEP reasonably calculated to enable the child to make progress that is appropriate in light of the child's circumstances.⁹ Although the public agency is responsible for determining when it is necessary to conduct an IEP Team meeting, the parents of a child with a disability have the right to request an IEP Team meeting at any time. If a child is not making progress at the level the IEP Team expected, despite receiving all the services and supports identified in the IEP, the IEP Team must meet to review and revise the IEP if necessary, to ensure the child is receiving appropriate interventions, special education and related services and supplementary aids and services, and to ensure the IEP's goals are individualized and ambitious.¹⁰

In this case, the goals for the Student on his June 2019 IEP were measurable and took into account the Student's disabilities. The goals addressed functional, academic, and behavioral needs. However, the January IEP created by the school shows that the IEP Team moved from a very high level of specially designed instruction at the day treatment program to a small amount of specially designed instruction – from nearly 30 hours to 30 minutes of SDI. No assessments were conducted in order to justify this drastic difference in services. The Written Notice does not articulate the reasons why the Student's percentage of time with peers increased in such a dramatic way, from 0% to 97%.

It appears from the documentation that the school's IEP Team changed the Student's IEP in order to meet the school's established curriculum, not to meet the Student's academic needs.¹¹ The school had not created an IEP for this Student that addresses his academic needs because the time allotted for special education did not match the Student's academic needs. The school has not complied with regulation regarding this allegation.

8. The Student's IEP lacks measurable goals in all subjects. MUSER IX(3)(A)(1)(b).
COMPLIANCE FOUND.

⁹ *Andrew F.*, 137 S. Ct. 988, 999 (2017).

¹⁰ *Id.* at 999-1000.

¹¹ The Department notes that if the school believes it cannot provide FAPE, it is obligated to propose an educational program that fits the child's special education needs. Parents who disagree with the proposed IEP may use the Department's dispute resolution systems.

Each student's IEP must contain a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum... and meet each of the child's other educational needs that result from the child's disability.

As stated above in previous determinations, the goals on the Student's June IEP are measurable and attainable. The IEP in place on February 1, 2019, the date that the Student was enrolled full-time at the school, contained measurable goals that pertained to the Student's specific needs. As evidenced by the evaluations, the Student's academic needs were in reading, writing, and mathematics.

Functional/Developmental performance means how the child demonstrates his/her skills and behaviors in cognition, communication, motor, adaptive, social/emotional and sensory areas. Generally, goals may focus on: executive functioning, habits of work, time management, learning strategies, daily living skills and behavior management. OT, PT and/or SLP needs would be reflected in this section. The Team discussed the Student's functional performance and goals at the January 2019 IEP Team meeting. The Student's functional needs, particularly involving his seeking negative reinforcement from peers and adults, were addressed in measurable goals on the IEP.

9. The IEP lacks transition goals and services. MUSER IX(3)(A)(1)(H).
NON-COMPLIANCE FOUND.

Regulations state that beginning not later than 9th grade the IEP Team will start a transition plan. Transition plans must be updated annually to establish measurable postsecondary goals related to training, education, employment, and, where appropriate, independent living skills. Transition assessments should be used to establish the content of the transition plans.¹²

The Department has issued guidance regarding transition plans in the Special Education Required Forms Procedural Manual. Post-secondary goals must reflect an outcome, not a process and must be measurable. Transition goals should reflect a real intent or plan and not simply state the hopes and desires of a child, but an intentional plan to achieve the goal. These goals must reflect the child's interests and preferences and must utilize assessment for development. Transition services and activities may include related services, community experiences, and services related to employment and other independent living objectives that are occurring during the life of the IEP with adult support.

The transition assessment that was used for the transition goals was a student interview. The transition goals on the Student's June 2019 IEP are as follows:

- Education/Training Goal: After graduation, the Student will pursue education in graphic design, construction and/or carpentry

¹² MUSER IX(3)(A)(1)(H).

- Employment goal – After graduation, the Student will be employed in the field of graphic design, construction and/or carpentry
- Independent Living Skills Goal: After graduation, the Student will live independently in an apartment or a house while working in the field of graphic design, construction and/or carpentry in order to support his independence.

The transition services and activities on the IEP stated that the Student would attend college, work part-time in one of three fields: graphic design, carpentry or construction, would continue to explore opportunities that help him become independent. He was to go on field trips into the community with his peers, and would continue to work with his vocational coach to help him reach post-secondary goals.

Given the nature of the Student’s disabilities and his difficulties with social interactions, the transition goals on the IEP are unrealistic without significantly more transition services.

10. The Student has been the target of bullying such that it has affected his ability to access a free appropriate public education. MUSER I(2); MUSER II(14); 34 CFR 300.101(a).
NO FINDING; NO DENIAL OF FAPE FOUND.

The Student entered the school full-time in February 2019. As early as February 1, 2019, the parent wrote to school personnel about staff use of shaming the Student in the classroom for not understanding material and not participating appropriately. The parent wrote that there had been an environment of group hazing, and when an aide told the students to cease hazing the Student, they did not.¹³ On March 5, 2019, school personnel and the parent corresponded about the Student being bullied in one teacher’s class.

A few weeks later, the Student called a peer a racially derogative term, after which the peer reported the Student to the administration. Administration and parents spoke with the Student about this behavior. During speech therapy that same week, the Student’s speech therapist discussed what bullying was and explained that the Student, when he was making fun of another student, was himself engaging in bullying others.

A bus incident between the Student and peers, when the Student instigated a response from his peers by repeating racist epithets toward a peer, resulted in a physical altercation. Later in the year, in June 2019, peers took the Student’s earbuds, which was a particular source of anxiety because the Student used them to listen to music when he needed to relax or focus on a task.

An observation conducted on April 30, 2019 by the psychologist performing the Student’s FBA stated that in one class period, the Student interacted inappropriately three times and when that behavior was ignored, he complied with directives and ceased the inappropriate

¹³ This incident involved peers taking the Student’s hat in the classroom and not returning it.

behavior. The observer also noted that a peer told the Student the incorrect page number when it was the Student's turn to participate and that several peers giggled when the Student stated an incorrect answer. The observer noted, "At times, [the Student] appeared to be competing with his peers to be more disruptive; while at other times, he was visibly looking at his peers when he made inappropriate comments apparently to assess whether his peers thought he was funny." The evaluator recommended several useful and practical ways to assist the Student and the school staff within the school setting.

Evidence gathered in this investigation does not support a finding for this allegation. The IEP Team may wish to consider the strategies suggested in the two recent FBAs during the 2019-2020 school year.

CORECTIVE ACTION THAT MUST BE COMPLETED BY THE SCHOOL

1. The school's administration and special education staff must receive training by the Department or by a special education attorney about the following regulations:
 - MUSER IV(2)(E)
 - MUSER V(1)(A)(3)
 - MUSER V(4)(B)
 - MUSER VI(2)(I)
 - MUSER VI(2)(J)
 - MUSER IX(3)(A)(1)(H)
 - MUSER IX(3)(B)(3)
 - MUSER IX(3)(D)(1)(b)(i)

The school must provide the date of the training, the agenda for the training, and a sign in sheet by **October 30, 2019**.

2. The Student's IEP Team must convene to
 - (a) determine appropriate IEP goals in mathematics and other stated goals on the IEP.
 - (b) develop transition goals, and
 - (c) discuss options for transition services that are appropriate for the Student.

Written notice from this meeting must be provided to the Department by **October 30, 2019**.

3. The charter school must provide 50 hours of compensatory education to the Student. The school must provide services that address the Student's academic, functional, behavioral and transition goals. The compensatory services must be provided in addition to the Student's existing educational program. Services must be provided by a certified special educator or an educational technician with oversight by a certified special educator specifically for these services. The school will choose the provider and provide documentation of the provision of these services to the Department **by May 15, 2020.**